

**United States Department of Labor
Employees' Compensation Appeals Board**

L.M., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Gainesville, FL, Employer**

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**Docket No. 12-1706
Issued: February 6, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 13, 2012 appellant filed a timely appeal from a July 9, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly found an overpayment of \$18,866.00 was created; and (2) whether it properly found appellant was at fault in creating the overpayment and was therefore not entitled to waiver.

FACTUAL HISTORY

On November 19, 1991 appellant, then a 51-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that she sustained a rash on her hands causally related to her federal

¹ 5 U.S.C. § 8101 *et seq.*

employment. OWCP accepted the claim for aggravation of contact dermatitis of both hands. Appellant returned to work at the employing establishment as a medical records technician on July 26, 1993. By decision dated October 21, 1993, OWCP determined that her actual earnings fairly and reasonably represented wage-earning capacity.

Appellant continued to receive wage-loss compensation based on her loss of wage-earning capacity. OWCP developed the medical evidence and by letter dated January 15, 2009, advised her that it proposed to terminate her compensation. No final decision terminating compensation was issued. OWCP periodically sent appellant a questionnaire (Form EN1032) requesting information as to any employment, dependents and receipt of other benefits. In an EN1032 dated September 18, 2009, appellant responded "yes" to a question as to whether she had received a regular retirement check in the last 15 months.

In a memorandum of telephone call (Form CA-110) dated November 3, 2009, OWCP stated that the employing establishment had reported appellant had retired effective October 3, 2009. A CA-110 form dated January 27, 2010 noted that the employing establishment had stated that, when appellant began receiving retirement benefits from the Office of Personnel Management (OPM), her compensation should cease. In a CA-110 form dated February 26, 2010, the employing establishment reported that appellant was seen the previous week and had stated that she was receiving OPM benefits. A CA-110 form dated April 26, 2010 indicated that OPM had been contacted and reported that OPM retirement benefits commenced on October 4, 2009.

By letter dated April 26, 2010, OWCP advised appellant that the evidence indicated that she may be eligible for or had been receiving OPM retirement benefits. It advised her that she could not receive both wage-loss compensation and OPM retirement for the same period. An election of benefits form was enclosed. On June 1, 2010 appellant indicated that she was electing OPM retirement benefits. She did not indicate an effective date of the election. Appellant submitted a September 20, 2010 EN1032 form noting that she had received OPM benefits and had retired from the employing establishment in October 2009.

The record indicates that appellant continued to receive wage-loss compensation through September 25, 2010. A worksheet dated January 11, 2011 indicated that, for the period September 27, 2009 to September 25, 2010, appellant received \$19,228.75 in net compensation, with \$362.75 of that amount attributable to the period September 27 to October 3, 2009.

By letter dated December 16, 2011, OWCP advised appellant of a preliminary determination that an overpayment of \$18,866.00 was created from October 4, 2009 to September 25, 2010. It explained that she had received OPM retirement benefits and wage-loss compensation during this period. OWCP found appellant was at fault, noting the April 26, 2010 letter and submission of a September 2010 EN1032 form reporting retirement benefits.

Appellant requested a hearing before an OWCP hearing representative, which was held on April 10, 2012. At the hearing she stated that she had been told by the employing

establishment at her exit interview that her compensation should continue because it was wage-loss income.²

By decision dated July 9, 2012, the hearing representative found an overpayment of \$18,866.00 occurred from October 4, 2009 to September 25, 2010. As to fault, the hearing representative found appellant at fault based on the submission of EN1032 forms that requested information regarding OPM benefits. The hearing representative stated that the EN1032 forms “clearly should have placed [appellant] on notice that she was not entitled to receipt of both benefits at the same time. The very nature of workers’ compensation benefits being an income replacement system and benefits derived from OPM retirement for the same period should have placed the claimant on notice that she was not entitled to receipt of both benefits for the same period.”

LEGAL PRECEDENT -- ISSUE 1

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section provides that, while an employee is receiving compensation, she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.³ The implementing regulations state that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁴ When a claimant receives compensation for wage loss and OPM retirement benefits concurrently, an overpayment of compensation is created.⁵

ANALYSIS -- ISSUE 1

The overpayment in this case was declared for the period October 4, 2009 to September 25, 2010. The record indicates that appellant received compensation for wage loss during this period. In addition, the evidence indicates that effective October 4, 2009 appellant also received retirement payments through OPM. As noted above, a claimant is not entitled to receive wage-loss compensation and OPM retirement concurrently.

OWCP calculated that the net compensation received from October 4, 2009 to September 25, 2010 was \$18,866.00. It included a worksheet with the specific compensation payments issued during this period. No contrary evidence was submitted. The Board accordingly finds that the evidence supports a finding that an overpayment of \$18,866.00 was created from October 4, 2009 to September 25, 2010.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) provides: “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when

² At the hearing it appeared that the hearing representative believed appellant had been found to be without fault in creating the overpayment.

³ 5 U.S.C. § 8116(a). As to retirement pay, an exception for service in the armed forces is enumerated.

⁴ 20 C.F.R. § 10.421(a).

⁵ See *D.D.*, Docket No. 12-675 (issued October 9, 2012).

adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”⁶ A claimant who is at fault in creating the overpayment is not entitled to waiver.⁷ On the issue of fault, 20 C.F.R. § 10.433 provides that an individual will be found at fault if he or she has done any of the following: “(1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known was incorrect.”

ANALYSIS -- ISSUE 2

OWCP’s hearing representative found appellant was at fault in creating the overpayment. He did not specifically discuss 20 C.F.R. § 10.433. It appeared that the hearing representative found that appellant had accepted payments she knew or should have known were incorrect. In this regard, the hearing representative refers to the submission of EN1032 forms that required the disclosure of OPM retirement benefits. The Board notes that appellant did state “yes” with respect to receipt of retirement payments on both September 18, 2009 and September 20, 2010 EN1032 forms.⁸ Moreover, the EN1032 form does not state that a claimant may not receive OPM benefits and wage-loss compensation concurrently. The form asks a claimant to disclose receipt of federal benefits or payments. In cases where the claimant has disclosed the receipt of OPM benefits on EN1032 forms, OWCP has found the claimant not to be at fault in creating an overpayment.⁹

The hearing representative also refers to the “nature of workers’ compensation benefits” and appears to assert that any claimant receiving wage-loss compensation should know that they cannot also receive OPM retirement. The Board has not found that such a presumption of knowledge exists, nor does the hearing representative cite to any relevant authority. A finding of fault is based on the specific circumstances of the case.¹⁰ The Board notes that appellant indicated in this case that she had received information from the employing establishment suggesting that she could continue her wage-loss compensation after retirement. There is no basis for a finding of fault on a presumption that appellant should have known she could not receive compensation and OPM retirement concurrently.

The notice to appellant that she could not receive compensation and OPM retirement concurrently was the April 26, 2010 letter from OWCP to appellant. This letter clearly advised that she could not receive both concurrently. Appellant should have known that the compensation payments she received after receipt of the April 26, 2010 letter were incorrect, because the letter clearly told her she could not receive wage-loss compensation and retirement benefits concurrently.

⁶ 5 U.S.C. § 8129(b).

⁷ See *Robert W. O’Brien*, 36 ECAB 541, 547 (1985).

⁸ It is not clear what retirement payments appellant may have received as of September 18, 2009.

⁹ See, e.g., *D.P.*, Docket No. 11-1841 (issued July 11, 2012).

¹⁰ 20 C.F.R. § 10.433(b) states that whether a claimant is at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment.

The case will accordingly be remanded to OWCP for proper findings on the issue of fault and waiver. OWCP should establish when appellant received the April 26, 2010 letter and identify the compensation payments accepted after that date. Appellant is properly found to be at fault with respect to these payments, as she should have known they were incorrect. As for compensation from October 4, 2009 until the April 26, 2010 letter was received, OWCP has not established fault. The case will be remanded for proper consideration of waiver. After such further development as OWCP deems necessary, it should issue an appropriate decision.

CONCLUSION

The Board finds that an overpayment of \$18,866.00 was created from October 4, 2009 to September 25, 2010. With respect to fault and waiver, the case is remanded to OWCP for proper findings.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 9, 2012 is affirmed with respect to fact and amount of the overpayment. The decision is set aside and remanded with respect to the finding of fault and denial of waiver.

Issued: February 6, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board